Wasunan Tonrab & Anor v Lee Ah Sin @ Lee Sin Kee

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-149–09 OF 2019
AHMAD MURAD JC
30 SEPTEMBER 2020

Civil Procedure — Summary judgment — Application for — Plaintiff applied for summary judgment for declaration of wills made by deceased was valid — Whether deceased lack testamentary capacity to make will — Whether deceased was under influence of plaintiff when making wills — Whether ownership of land affected validity of wills — Whether plaintiff entitled to make claim against defendant based on summary judgment application

The plaintiffs applied for summary judgment in encl 7 instituted for a declaration that the last will and testament of the late Mr Lee Poi Sam was the will dated 17 July 2018 and that the will dated 1 April 2005 was revoked and for other ancillary orders. The late Mr Lee Poi Sam ('the deceased') died on 23 June 2019. Prior to his death, the deceased made three wills: (a) will dated 1 April 2005 ('the 2005 will'), naming the defendant as executor and sole beneficiary of his estate; (b) a will dated 27 April 2016 ('the 2016 will'), naming the first plaintiff as the executrix and sole beneficiary of his estate; and (c) a will dated 17 July 2018 ('the 2018 will'), naming both plaintiffs as the executrixes and the only beneficiaries of his estate. Following the death of the deceased, the plaintiffs filed an Originating Summons No JA-32NCvC-371–07 of 2019 in the Johor Bahru High Court to obtain a grant of probate of the 2018 will. A grant of probate was duly issued to the plaintiffs in the said action after the plaintiffs produced an affidavit by the attesting witnesses to prove the 2018 will. However, the grant of probate obtained in the said action could not be sealed because the defendant lodged a caveat in the central registry in the Kuala Lumpur High Court which was registered as WA-Kaveat-1824–07 of 2019. According to the caveat, the defendant was claiming an interest in the estate of the deceased under a will dated 1 April 2005 ('the 2005 will'). As such, the plaintiffs had to file the present suit to prove the 2018 will in solemn form. The plaintiffs submitted that the 2005 will which was relied on by the defendant was revoked twice by the deceased. Prior to the 2018 will, the deceased had in fact made the 2016 will. The plaintiff further contended that the deceased's actions as narrated by his solicitor who prepared the 2016 will demonstrated without doubt the deceased's intention to the 2005 will and his intention was borne out in the express revocation stated in para 1 of the 2016 will. The identical revocation clause was repeated in the 2018 will. It was contended by the plaintiff that it was patently clear from the evidence that the deceased had expressly revoked the 2005 will twice and the defendant's reliance on that will

to stake a claim in the deceased's estate was clearly misguided. The defendant, on the other hand, challenged, the validity of the 2018 will on the main contention was that the deceased lacked testamentary capacity and was subject to undue influence by the plaintiffs. The defendant further argued on the ownership of the land and it was further submitted that a contested probate matter should go for full trial and O 14 application was not applicable for such matters.

Held, allowing plaintiff's application in encl 7 with costs of RM7,000 subject to allocator fee:

(1) The allegations that the deceased lack testamentary capacity was just a bare allegation totally unsupported by any evidence. It was found that on a balance of probabilities that the deceased had full capacity to make both the 2016 and 2018 wills. The relevant paragraph of the defendant's affidavit merely states that the deceased's age and the frequent visitation to hospitals. The deceased was alleged to have suffered a stroke. The defendant made numerous other general allegations without any supportive evidence to prove the deceased's lack of mental capacity to make the 2018 will. The allegations by the defendant was pure conjecture and full of unsupported assumptions. The defendant had failed to prove the deceased's alleged lack of testamentary capacity (see paras 20–22).

(2) The defendant failed to adduce any evidence in his affidavit to support the allegations that the deceased was under undue influence by the plaintiffs when he made the 2018 will. The defendant merely attempted to draw an inference from the circumstances surrounding the deceased's making of the 2018 will, to suggest the deceased was under the undue influence by the plaintiffs. Nowhere in the affidavit in reply did the defendant even alleged any coercion by the plaintiffs on the deceased (see paras 23–24).

(3) The allegation by the defendant concerning the ownership of the land was totally irrelevant to the issue of the validity of the 2018 will. The deceased was only a lienholder of the land and never claimed ownership. In any event, the land was registered under the name of a third party. Any claim the defendant might have on the said land, should be pursued via an action against the registered owner, who incidentally was not a party to the action (see para 25).

(4) The claim did not invoke any of the excluded claims referred to in O 14 r 1(2)(a) and (b). Thus, it did not fall within the exceptions and could be decided summarily (see para 26).

[Bahasa Malaysia summary

Plaintif memohon penghakiman terus dalam lampiran 7 yang dimulakan untuk pengisytiharan bahawa surat wasiat terakhir dan wasiat mendiang Encik

Lee Poi Sam adalah wasiat bertarikh 17 Julai 2018 dan bahawa wasiat bertarikh 1 April 2005 telah dibatalkan dan untuk perintah tambahan yang lain. Mendiang Lee Poi Sam ('si mati') meninggal dunia pada 23 Jun 2019. Sebelum kematiannya, si mati membuat tiga surat wasiat: (a) surat wasiat bertarikh 1 April 2005 ('surat wasiat 2005'), dengan menamakan defendan sebagai pelaksana dan penerima tunggal harta pusaka; (b) surat wasiat bertarikh 27 April 2016 ('surat wasiat 2016'), menamakan plaintif pertama sebagai pelaksana dan penerima tunggal harta pusaka; dan (c) surat wasiat bertarikh 17 Julai 2018 ('surat wasiat 2018'), dengan menamakan kedua-dua plaintif sebagai pelaksana dan satu-satunya penerima harta pusaka. Berikutan kematian si mati, pihak plaintif memfailkan Saman Pemula: JA-32NCvC-371–07 Tahun 2019 di Mahkamah Tinggi Johor Bahru untuk mendapatkan sijil pengesahan surat wasiat 2018. Pemberian probet dikeluarkan sewajarnya kepada plaintif dalam tindakan tersebut setelah plaintif mengemukakan afidavit oleh saksi untuk membuktikan surat wasiat 2018. Namun, pemberian probet yang diperoleh dalam tindakan tersebut tidak dapat diputuskan kerana defendan mengemukakan kaveat di pusat pendaftaran Mahkamah Tinggi Kuala Lumpur yang didaftarkan sebagai WA-Kaveat-1824–07 Tahun 2019. Menurut kaveat tersebut, defendan menuntut kepentingan dalam harta pusaka si mati di bawah surat wasiat bertarikh 1 April 2005 ('surat wasiat 2005'). Oleh yang demikian, pihak plaintif harus memfailkan tuntutan ini untuk membuktikan surat wasiat 2018 adalah takzim. Plaintif berhujah bahawa surat wasiat 2005 yang diguna pakai oleh defendan telah dibatalkan dua kali oleh si mati. Sebelum surat wasiat 2018, si mati sebenarnya telah membuat surat wasiat 2016. Plaintif selanjutnya berhujah bahawa tindakan si mati sebagaimana yang diceritakan oleh peguamnya yang menyiapkan surat wasiat 2016 menunjukkan tanpa keraguan niat si mati terhadap surat wasiat 2005 dan niatnya ditunaikan dalam pembatalan yang dinyatakan dalam perenggan 1 surat wasiat 2016. Klausa pembatalan yang serupa diulang pada surat wasiat 2018. Plaintif mengatakan bahawa jelas dari bukti bahawa si mati telah secara jelas membatalkan surat wasiat 2005 dua kali dan kebergantungan defendan pada surat wasiat itu untuk mempertaruhkan tuntutan harta pusaka si mati adalah secara jelas salah. Sebaliknya, defendan mencabar, kesahihan surat wasiat 2018 dengan alasan utama adalah bahawa si mati tidak mempunyai kemampuan memberikan wasiat dan boleh dipengaruhi secara tidak wajar oleh plaintif. Defendan selanjutnya berhujah mengenai hak milik tanah dan selanjutnya dikemukakan bahawa perkara probet yang dipertikaikan harus diadili secara penuh dan permohonan O 14 tidak boleh diguna pakai untuk perkara tersebut.

Diputuskan, membenarkan permohonan plaintif di lampiran 7 dengan kos RM7,000 tertakluk kepada fi alokatur:

(1) Tuduhan bahawa si mati kekurangan kemampuan memberikan wasiat hanyalah tuduhan kosong yang tidak disokong oleh bukti. Didapati

bahawa pada tahap kebarangkalian bahawa si mati mempunyai kemampuan penuh untuk membuat kedua-dua wasiat 2016 dan 2018. Perenggan afidavit defendan yang relevan hanya menyatakan bahawa umur si mati dan kerap mengunjungi hospital. Si mati didakwa menderita strok. Defendan membuat banyak tuduhan umum lain tanpa bukti sokongan untuk membuktikan kekurangan keupayaan mental si mati untuk membuat surat wasiat 2018. Tuduhan oleh defendan adalah hanyalah tekaan dan penuh dengan andaian yang tidak disokong. Defendan telah gagal membuktikan si mati yang tidak berkemampuan untuk memberikan wasiat (lihat perenggan 20–22).

(2) Defendan gagal mengemukakan bukti dalam afidavitnya untuk menyokong tuduhan bahawa si mati berada di bawah pengaruh tidak wajar oleh plaintif ketika dia membuat surat wasiat 2018. Defendan hanya berusaha untuk membuat kesimpulan dari keadaan di mana si mati membuat keputusan tahun 2018 untuk menunjukkan bahawa si mati berada di bawah pengaruh tidak wajar oleh pihak plaintif. Tidak ada yang dijelaskan dalam afidavit sebagai tanggapan, defendan bahkan menuduh ada pemaksaan oleh pihak plaintif ke atas si mati (lihat perenggan 23–24).

(3) Tuduhan defendan mengenai pemilikan tanah itu sama sekali tidak relevan dengan isu kesahihan surat wasiat 2018. Si mati hanya pemegang hak milik tanah secara *lien* dan tidak pernah menuntut hak milik tersebut. Bagaimanapun, tanah tersebut didaftarkan atas nama pihak ketiga. Segala tuntutan yang mungkin dimiliki defendan di atas tanah tersebut, harus dituntut melalui tindakan terhadap pemilik yang terdaftar, yang kebetulan bukan pihak yang mengambil tindakan tersebut (lihat perenggan 25).

(4) Tuntutan tersebut tidak menggunakan tuntutan yang dikecualikan sebagaimana disebut dalam A 14 k 1(2)(a) dan (b). Oleh itu, ini tidak termasuk dalam pengecualian tersebut dan dapat diputuskan secara terus (lihat perenggan 26).]

Cases referred to

Abdol Mulok bin Awang Damit v Perdana Industri Holdings Bhd [2003] 4 MLJ 441; [2003] 3 CLJ 497, CA (refd)
Boyse v Rossborough (1857) 6 HL Cas 2, HL (refd)
Wingrove v Wingrove (1885) 11 PD 81 (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 1(2), (2)(a), (2)(b)
Wills Act 1959 s 5, 5(2)

R Paramanandan (Clarence Edwin Law Offices) for the plaintiff.

Ungku Ahmad Hafis (Chiong & Partners) for the defendant.

Ahmad Murad JC:

INTRODUCTION

[1] The plaintiffs applied for summary judgment ('encl 7') in this action, instituted for a declaration that the last will and testament of the late Mr Lee Poi Sam is the will dated 17 July 2018 and that the will dated 1 April 2005 has been revoked, and for other ancillary orders.

After reading the pleadings, the affidavits and the written submissions filed by the parties, I allowed the plaintiffs' application for summary judgment in terms of the prayers in the statement of claim. The defendant being dissatisfied with my decision has filed an appeal. The grounds for my decision appear below.

BACKGROUND FACTS

[2] The late Mr Lee Poi Sam ('the deceased') died on 23 June 2019. Prior to his death, he made three wills:

(a) will dated 1 April 2005 ('the 2005 will'), naming the defendant as executor and sole beneficiary of his estate;

(b) a will dated 27 April 2016 ('the 2016 will'), naming the first plaintiff as the executrix and sole beneficiary of his estate; and

(c) a will dated 17 July 2018 ('the 2018 will'), naming both plaintiffs as the executrixes and the only beneficiaries of his estate.

The plaintiffs are the joint executrixes and the only beneficiaries of the estate of the deceased according to the terms of his last will and testament dated 17 July 2018. The relevant provisions of the said will for present purposes state the following:

> THIS IS *THE LAST WILL AND TESTAMENT* OF ME, *LEE POI SAM (NRIC NO 470113–01–5281/3522923)* of *LOT 2837, JALAN ALOR BUKIT, 81000 KULAI, JOHOR DARUL TAKZIM* (Exhibit P-1 at pages 7–11 of Enclosure 7).
>
> 1 I HEREBY REVOKE ALL FORMER WILLS, codicils and Testamentary Dispositions herein before made by me and declare this to be my *Last Will*.
>
> 2 I HEREBY APPOINT *WASUNAN TONRAB (THAILAND NATIONAL IDENTITY CARD NO 1520100103239) (THAILAND PASSPORT NO AB1005351)* AND *THITIMA SAE-LEE (THAILAND NATIONAL IDENTITY CARD NO 1520100084111) (THAILAND PASSPORT NO AA8187380)* both of Lot 2837, Jalan Alor Bukit, 81000 Kulai, Johor to be the Executrixes of this Last Will.
>
> 3 ...

4 *I HEREBY GIVE BEQUEATH AND DEVISE* to *WASUNAN TONRAB (THAILAND NATIONAL IDENTITY CARD NO (THAILAND PASSPORT NO AB1005351)* AND *THITIMA SAE-LEE (THAILAND NATIONAL IDENTITY CARD NO 1520100084111) (THAILAND PASSPORT NO AA8187380) jointly and equally*, all my legal and beneficial rights, interests profits and benefits in the whole share of the Property held under *GM 112 LOT 2838 IN THE MUKIM OF KULAI, DISTRICT OF KULAIJAYA, STATE OF JOHOR* together with the building existing on the Land or to be erected on the Land ('the Property'), for which I have lodged a *lienholders' caveat* over. The original title shall be kept by my beneficiaries and a lienholder's caveat lodged over the Property.

5 *I HEREBY GIVE BEQUEATH AND DEVISE* to *WASUNAN TONRAB (THAILAND NATIONAL IDENTITY CARD NO 1520100103239) (THAILAND PASSPORT NO AB1005351)* AND *THITIMA SAE-LEE (THAILAND NATIONAL IDENTITY CARD NO 1520100084111) (THAILAND PASSPORT NO AA8187380)* the following jointly and absolutely:

5.1 all the remaining money or monies that may be in my savings account, fixed deposit account and current account with any financial bank or institution in Malaysia or anywhere else absolutely;

5.2 all the insurance money with any insurance company or the insurance policy or policies that I may have in my name and that becomes due and payable at my demise absolutely;

6 ...

7 I further declare that I deliberately have made no provisions for other beneficiaries who may be entitled or claim to be entitled and if any one of my beneficiaries, their heirs and/or personal representatives should severally or jointly contest my last will and testament, then upon such occurrence, any such of them contesting shall each be entitled to a sum of Ringgit Malaysia One (RM1.00) only.

[3] Following the death of the deceased, the plaintiffs filed an Originating Summons ('OS') No JA-32NCvC-371–07 of 2019 in the Johor Bahru High Court to obtain a grant of probate of the 2018 will (exh P2 at pp 12–19 of encl 8).

[4] A grant of probate was duly issued to the plaintiffs in the said action after the plaintiffs produced an affidavit by the attesting witnesses to prove the 2018 will (exh P3 at pp 20–28 of encl 8).

[5] However, the grant of probate obtained in the said action could not be sealed because the defendant lodged a caveat in the central registry in the Kuala Lumpur High Court which has been registered as WA-Kaveat-1824–07 of

2019. According to the caveat, the defendant is claiming an interest in the estate of the deceased under a will dated 1 April 2005 ('the 2005 will') (exh P4 at pp 29–30 of encl 8).

[6] As such, the plaintiffs had to file this suit to prove the 2018 will in solemn form.

THE DEFENDANT'S CASE

[7] The crux of the defendant's defence and counterclaim is that the defendant is the rightful executor and beneficiary of the deceased's estate based on the 2005 will and the 2018 will was obtained by the plaintiffs under undue influence. The defendant also alleges that the deceased did not have testamentary capacity to execute the 2018 will, hence it is invalid.

[8] In his statement of defence and counterclaim, the defendant prayed for the following orders:

(a) that the probate obtained by the plaintiffs, vide Originating Summon No JA-32NCVC-371–07 of 2019 on 19 August 2019 be set aside, is invalid and unenforceable; and

(b) a declaration that the will of Lee Poi Sam ('the deceased') dated 17 July 2018 is invalid and unenforceable and the will dated 1 April 2015 is valid and enforceable.

[9] The defendant makes the following claims and allegations in his statement of defence:

(a) he is the brother of the deceased;

(b) the deceased made the 2005 will which named the defendant as the sole executor and beneficiary of the deceased's estate;

(c) the objective of the 2005 will was to transfer property identified as Geran Mukim 112, Lot 2838, Mukim Kulai, Daerah Kulai ('the said land') to the defendant for the benefit of all the siblings of the defendant (para 5 statement of defence);

(d) the said land was originally mortgaged to the defendant's late father as consideration for a loan of RM2,500 given by him to one Warjo bin Kajum sometime in 1965. The said Warjo bin Kajum, the current registered owner of the land failed to repay the loan, hence the defendant's father became the beneficial owner of the said land (para 6 of statement of defence);

(e) when the grant to the said land was given to the deceased, he became the 'bare trustee' of the said land because the loan was given by the defendant's father and not the deceased;

(f) the defendant filed an originating summons vide JA-32NCVC-388–07 of 2019 at the High Court of Johor Bahru for a grant of probate in respect of the deceased's estate but failed to obtain the order since the plaintiffs had earlier lodged a caveat at the Kuala Lumpur High Court in respect of the deceased's estate; and

(g) the defendant then lodged a caveat at the Kuala Lumpur High Court vide caveat WA-KAVEAT-1824–07 of 2019.

[10] With respect to the 2018 will, the defendant alleged that the deceased lacked 'testamentary capacity' to make the 2018 will for the following reasons:

(a) the deceased was 71 years old at that time and he was under the care of the defendant;

(b) the deceased was undergoing hospital treatment and was in need of continuous medications;

(c) the deceased suffered a stroke and was not in a proper state of mind to instruct the writing of the two subsequent wills;

(d) the deceased could not possibly understand the effect of the two wills; and

(e) the effect of the last two wills contradict the oral agreement between the brothers and contradict the position of the deceased as 'bare trustee' (para 17 — statement of defence).

[11] The defendant also alleged that the last two wills were prepared under suspicious circumstances since the deceased did not inform the other brothers about his new wills and he did not use the services of his usual lawyer to prepare the two new wills.

[12] The defendant submits that procedurally, the plaintiffs should have filed this application in the probate action instead of filing separate writ action for the declarations sought.

The defendant also submits that this is not a proper case for summary judgment since there are disputes of facts which require witnesses to be examined in court.

THE PLAINTIFFS' CASE

[13] The plaintiffs submit that the 2005 will which is relied on by the defendant was revoked twice by the deceased. Prior to the 2018 will, the deceased had in fact made the 2016 will. In this will, it was clearly stated:

> THIS IS *THE LAST WILL AND TESTAMENT* OF ME, *LEE POI SAM (NRIC NO 470113–01–5281/3522923)* of *LOT 2837, JALAN ALOR BUKIT, 81000 KULAI, JOHOR DARUL TAKZIM* (Exhibit P-1 at pages 7–11 of Enclosure 7).
>
> I HEREBY REVOKE ALL FORMER WILLS, codicils and Testamentary Dispositions herein before made by me and declare this to be my *Last Will*.

[14] One of the attesting witnesses to the 2016 will, an advocate and solicitor named Shanmugiah Thevar Selvarani, made a statutory declaration (exh P3 of encl 8) confirming the following facts:

(a) she is a legal practitioner in the law firm known as Zulkafli, Rani & Co;

(b) the deceased appointed the firm to prepare the will dated 27 April 2016 and she was the solicitor acting for the deceased to prepare the said will and was also one of its attesting witnesses;

(c) on 20 April 2016, the deceased went to the law firm and met her. The deceased gave her instructions to prepare his last will to give his entire estate to his child whose name is Wasunan Tonrab who is the first plaintiff in this action;

(d) the deceased went to the firm alone unaccompanied and gave her specific instructions together with all the relevant documents to prepare the will;

(e) the deceased also paid the law firm's legal fees and in line with the deceased's instructions, the will was prepared; and

(f) on 27 April 2016, the deceased came again to the law firm to execute the will which had been prepared in accordance with the instructions given to her.

[15] The deceased's actions as narrated by his solicitor who prepared the 2016 will demonstrate without doubt the deceased's intention to the 2005 will and his intention is borne out in the express revocation stated in para 1 of the 2016 will.

[16] The identical revocation clause was repeated in the 2018 will. In the additional affidavit affirmed by Chang Mei Kee, (exh P3 of encl 8) an advocate and solicitor and one of the attesting witnesses to the 2018 will, she confirmed:

(a) she is an advocate and solicitor practicing in the law firm known as Henry Soong & Chang;

(b) the deceased appointed the aforesaid firm to prepare the last will and testament dated 17 July 2018;

(c) sometime in June 2018 or early July 2018, the deceased went to the firm and met her;

(d) the deceased gave her instructions to prepare a will to leave his entire estate to his two children ie the plaintiffs in this action;

(e) at the time, the deceased brought along a copy of his 2016 will prepared by Zulkafli, Rani & Co;

(f) the deceased instructed her to prepare a new will repeating the same provisions in the will dated 27 April 2016 but with the addition of his other child, the second plaintiff, as a joint executrix and joint beneficiary;

(g) the deceased also instructed her to clearly state in the will that he had a registered *lienholder's caveat* on GM 112 Lot 2838 Mukim Kulai and the deceased directed that the original issue document of title to the land be kept by the plaintiffs;

(h) the deceased informed her at the meeting that he wanted a new will because his earlier will dated 27 April 2016 prepared by Zulkafli, Rani & Co failed to explain or *describe that the deceased's interest in the aforesaid land was that of a lienholder*;

(i) at the time the deceased went to the firm to give the aforesaid instructions, he came to the law firm with the first plaintiff and gave to the solicitor all the relevant documents; and

(j) on 17 July 2018, the deceased returned to the law firm alone and signed the last will and testament dated 17 July 2018 in front of her and another solicitor, Chang Tau Sian, who is also practicing in the same firm.

[17] Thus, It is patently clear from the evidence that the deceased had expressly revoked the 2005 will twice. As such, the defendant's reliance on that will to stake a claim in the deceased's estate is clearly, with respect, misguided.

FINDINGS BY THE COURT

[18] The defendant raised a number of issues in his submission to challenge the validity of the 2018 will.

In order to determine the validity of the 2018 will, the plaintiffs need to prove

that the said will has complied with the formal requirements of the Wills Act 1959 ('the Act'). A

Section 5 of the Act states that 'No will shall be valid unless it is in writing and executed in manner hereinafter mentioned'.

Section 5(2) of the Act then provides: B

> *Every will shall be signed at the foot or end thereof by the testator* or by some other person in his presence and by his direction; *such signature shall be made* or acknowledged by the testator as the signature to his will *in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary* ... (Emphasis added.) C

[19] In the present case, the deceased signed the 2018 will at the bottom end. He signed it in the presence of two witnesses who have both subscribed the will in the presence of the testator. Both witnesses are advocates and solicitors and each have respectively affirmed an affidavit confirming that the deceased signed the will in their presence and they subscribed the will in the deceased's presence (exh P1 of encl 8 at p 11). Therefore, it is clear that the 2018 will has fully complied with the provisions of the Wills Act 1959 and is prima facie a valid will. D E

[20] The plaintiffs having established that the 2018 will is valid, it now falls on the defendant to prove on a balance of probabilities that the said will is invalid as he has alleged in his statement of defence. His main contention is that the deceased lacked testamentary capacity and was subject to undue influence by the plaintiffs. F

It is a settled law of evidence that he who alleges must prove his allegations. I have perused in detail, the defendant's affidavit in reply and I find that the allegations that the deceased lack testamentary capacity is just a bare allegation totally unsupported by any evidence. The relevant paragraph of the defendant's affidavit merely states that the deceased's age (71 years old) and the frequent visitation to hospitals. The deceased was alleged to have suffered a stroke. The defendant made numerous other general allegations without any supportive evidence to prove the deceased's lack of mental capacity to make the 2018 will. G H

[21] The defendant claims that the deceased lived with him for some time and yet he failed to produce any medical report to show that the deceased suffered from any of the medical conditions as alleged. Such report could have been obtained earlier from the hospitals which had treated the deceased. I

[22] In contrast, the plaintiffs have produced the affidavit and statutory declaration by the two solicitors who attended to the 2016 and 2018 wills, who

claimed under oath that the deceased was fully aware of what he was doing at that point of time. They had given detailed reports of how he came to their respective offices and gave detailed instructions on how the two wills were to be drafted.

After giving due consideration to the affidavit in support by the plaintiffs and the defendant's affidavit in reply, I find on a balance of probabilities that the deceased had full capacity to make both the 2016 and 2018 wills. I find that the allegations by the defendant is pure conjecture and full of unsupported assumptions. Therefore, the defendant had failed to prove the deceased's alleged lack of testamentary capacity.

[23] The defendant also alleged that the deceased was under undue influence by the plaintiffs when he made the 2018 will, but again failed to adduce any evidence in his affidavit to support such allegations. The defendant merely attempted to draw an inference from the circumstances surrounding the deceased's making of the 2018 will to suggest he was under the 'undue influence' by the plaintiffs.

The basis of such allegations includes:

(a) the deceased was a stroke patient, and hence easily influenced;

(b) the plaintiffs being based in Thailand and rarely visited the deceased; and

(c) plaintiffs did not take good care of the deceased's welfare and other allegations in paras 36 and 37 of defendant's submission, including the alleged suspicious circumstances just because the deceased used new lawyers instead of his former lawyer to make the 2016 and 2018 wills.

[24] The meaning of undue influence in probate actions was explained by the learned judge in *Wingrove v Wingrove* (1885) 11 PD 81:

> To be undue influence in the eye of the law there must be — to sum it in a word — *coercion*. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is *coerced* into doing that which he or she does not desire to do, that it is undue influence.

It is clear from the speech by the learned judge that the crucial element in any act of undue influence on a testator is 'coercion'.

In the present case, nowhere in his affidavit in reply does the defendant even allege any coercion by the plaintiffs on the deceased.

It has been held by the House of Lords in *Boyse v Rossborough* (1857) 6 HL Cas 2 that:

> the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be pressured. This basic principle was reiterated in the Privy Council case of *Craig v Lamoureux* [1920] AC 349.

Having perused the affidavit in reply and submissions by the defendant, I find that he has failed to prove that the deceased was under any undue influence when he made both the 2016 and 2018 wills.

[25] The other allegation by the defendant concerns the ownership of the land. That is totally irrelevant to the issue of the validity of the 2018 will. The deceased was only a lienholder of the land and never claimed ownership. In any event, the land is registered under the name of a third party. Any claim the defendant may have on the said land, should be pursued via an action against the registered owner, who incidentally is not a party to this action.

[26] The defendant submitted that a contested probate matter should go for full trial and O 14 application is not applicable for such matters.

Order 14 r 1(2) states:

> Subject to paragraph (3) this rule applies to every action begun by writ other than:
>
> (a) *a claim* by the plaintiff *for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage*; or
>
> (b) *a claim* by the plaintiff *based on an allegation of fraud*.

This claim does not invoke any of the excluded claims referred to in (a) and (b) above. Thus, this case does not fall within the exceptions in r 1(2) and can be decided summarily.

[27] Richard Malanjum JCA (later CJ) in *Abdol Mulok bin Awang Damit v Perdana Industri Holdings Bhd* [2003] 4 MLJ 441; [2003] 3 CLJ 497 held:

> *It was the contention of learned counsel for the appellant that since it was only an* O 14 *application all that was required of the appellant was to raise triable issues and that he should not be expected to come up with proofs* as ruled by the learned judge in the court below. *With respect such a submission is not entirely consistent with our current judicial trend. Bare assertion does not necessarily amount to a triable issue thereby compelling a case to go for a full trial. It may still be subject to curial scrutiny for its value.* Indeed in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ Rep 14 his Lordship Mohd Azmi FCJ gave a clear guide on the approach to be adopted ...

[28] In this case, the defendant has only made bare allegations and has failed to produce any evidence to support his allegations. The evidence given by the

three independent lawyers whom the deceased appointed himself and the fact that he was unaccompanied when he went to execute the 2016 and 2018 wills respectively have not been discredited by the defendant. The plaintiffs should not be put to the cost and expense of a trial just because the defendant made bare allegations and assertions that the deceased lacked testamentary capacity or was subjected to undue influence. There is also no evidence in this case to suggest any suspicious circumstances whatsoever.

CONCLUSION

[29] Based on the reasons aforesaid, I allowed the plaintiffs' application in encl 7 with costs of RM4,000 subject to allocatur fee.

Plaintiff's application in encl 7 allowed with costs of RM7,000 subject to allocator fee.

Reported by Mohd Kamarul Anwar